

the ninth century.¹ The declaration of *consensus* still took place elsewhere than in church, and not until the rituals of the eleventh and twelfth centuries does the priest ask for it, or is it asked for in his presence. In the Greek ritual there has never yet been any declaration of *consensus*?"

427. The usage as to religious ceremony. The more pious people were, the more anxious they were to put all their doings under church sanction, and they sought the advice of honored ecclesiastics as to marriage. Such is the sense of Ignatius to Polycarp, chapter 5. Tertullian was a rigorist and extremist, whose utterances do not represent fact. In our own law and usage a common-law marriage is valid, but people of dignified and serious conduct, still more people of religious feeling, do not seek the minimum which the law will enforce. They seek to comply with the usages in their full extent, and to satisfy the whole law of the religious body to which they belong. In like manner, there was a great latitude from the fourth to the sixteenth century, while the Christian church was trying to mold the barbarian mores to its own standards in the usages which were current, but an ecclesiastical function was not necessary to a valid marriage until the Council of Trent. In fact a wedding in church never was an unconditional requirement for a valid marriage among German Roman Catholics until the end of the eighteenth century.³ Somewhat parallel cases of the addition of religious ceremonies to solemn public acts which had been developed in the mores are the emancipation of a slave, and the making of a knight.⁴

428. Mode of expressing *consensus*. If the consent of the

parties is regarded as essential, then the public proceedings must bring out an expression of will. The ancient German usage was that the friends formed a circle in which the persons to be married took their place, and the woman's guardian, later her most distinguished friend, asked them (the woman first) whether it was their will to become man and wife, — these terms being

¹ Friedberg, *Recht der Eheschliessung*, 8.

² *Ibid.*, *g*.

⁸ Stammler, *Stellung der Frauen*, 27.

⁴ Jenks, *Law and Politics in the Middle Ages*^ 251.